No. 79-6779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER LITTLE,

Appellant,

v.

GLORIA STREATER,

Appellee

ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

BRIEF FOR APPELLEE

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QUESTION PRESENTED

Conn. Gen. Stat. Section 46b-168 (1979) provides that the costs of blood grouping tests in paternity actions shall be paid by the party requesting the tests.

1. Does Conn. Gen. Stat. Section 46b-168 (1979) violate the Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States as it is applied to indigent defendants?

PARTIES TO THE PROCEEDINGS

(1) *Walter Little*, the appellant, was the defendant in the proceedings below.

(2) *Gloria Streater*, the appellee, was the plaintiff in the proceedings below.

(3) *Carl R. Ajello*, the Attorney General of the State of Connecticut, is a party to this proceeding pursuant to Conn. Gen. Stat. Section 46b-160 (1979).

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OPINIONS BELOW

The opinion of the Appellate Session of the Superior Court of Connecticut (J.A. 25) is unreported. The order of the Supreme Court of Connecticut denying certification is reported at 180 Conn. 756, 414 A.2d 199 (1980). No opinions were filed by the Superior Court of Connecticut at the trial level.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. Section 1257 (2) (1976), the validity of Conn. Gen. Stat. Section 46b-168 (1979) having been drawn into question on the ground of its being repugnant to the Constitution of the United States as applied in this case and the decision of the Appellate Session of the Superior Court of Connecticut being in favor of its validity.

The judgment of the Appellate Session of the Superior Court of Connecticut was entered on April 1, 1980. A Notice of Appeal to this Court, a copy of which appears at p. 4a of the Appendix to the Appellant's Jurisdictional Statement, was duly filed in the Appellate Session of the Superior Court on June 3, 1980. The case was docketed in this Court and a Jurisdictional Statement filed on June 16, 1980. This Court noted probable jurisdiction on October 6, 1980. (J.A. 27).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States. That section provides, in relevant part, that:

> [N]or shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Conn. Gen. Stat. Section 46b-168 (1979). That statute provides that:

> In any proceeding in which a question of paternity is an issue, the court, on motion of any party, may order the mother, her child and the putative father or the husband of the mother to

submit to one or more blood grouping tests, to be made by a qualified physician or other qualified person, designated by the court, to determine whether or not the putative father or the husband of the mother can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where such results establish definite exclusion of the putative father or such husband as such father. The costs of making such tests shall be chargeable against the party making the motion.

STATEMENT OF THE CASE

On May 21, 1975, Gloria Streater, the Appellee, gave birth to a female child, Kenya Chantel Streater.

On July 11, 1977, the defendant instituted a paternity action in which she named the appellant, Walter Little, to be the father of her minor child, Kenyatta Chantel Streater.

The appellant moved that the respondent, her minor child, and himself be ordered to submit to blood grouping tests.

The appellant further moved that the costs of the requested blood grouping tests should be paid by the State of Connecticut due to his indigency.

The appellant's motion for blood grouping tests was granted by the trial court. However, his request that the State of Connecticut bear the expense of the tests was denied.

On October 4, 1978, after a full hearing in which the appellant participated with the aid of legal counsel, Walter Little was adjudged to be the father of Gloria Streater's minor child, Kenyatta Chantel Streater.

The Petitioner appealed the trial court's denial of his request that the State of Connecticut bear the financial

burden of blood grouping tests to the Appellate Session of the Superior Court of Connecticut.

On February 29, 1980, the Appellate Session of the Superior Court of Connecticut affirmed the trial court's ruling by finding that the Petitioner's appeal was controlled by the holding of *Ferro v. Morgan*, 177 Conn. 753, 399 A.2d 526 (1979), which held that Conn. Gen. Stat. Section 46b-168 (1979) violates neither the Due Process nor Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

The Petitioner then filed for certification of the present issue to the Supreme Court of Connecticut which denied Walter Little's petition on April 1, 1980.

SUMMARY OF ARGUMENT

The Petitioner, Walter Little, was an indigent defendant in a paternity action instituted in the State of Connecticut. During the course of the proceedings below the petitioner requested that the respondent, her minor child and himself be ordered to submit to blood grouping tests at the expense of the State of Connecticut. Conn. Gen. Stat. Section 46b-168 provides that the costs of such tests will be borne by the party requesting them.

Conn. Gen. Stat. Section 46b-168 does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Connecticut Supreme Court in the case of *Robinson v. Apuzzo* held that paternity actions in Connecticut are civil actions and are not criminal or quasi-criminal in nature. The petitioner has been accorded the due process any other civil litigant should be extended in the fact he has been given a meaningful opportunity to be heard. The petitioner's defense was made with the aid of legal counsel, he was able to explore through pretrial discovery, and he was able to cross examine the respondent and present witnesses on his own behalf.

The State of Connecticut in administering its judicial system may impose certain fees and assess certain costs which do not deny a party access to the judicial process. *U.S. v. Kras*, 409 U.S. 434; *Ortwein v. Schwab*, 410 U.S. 656. The trial court's refusal to order the State of Connecticut to assume the costs of the petitioner's blood grouping tests pursuant to Conn. Gen. Stat. Section 46b-168 did not deny the petitioner the opportunity to be meaningfully heard.

The State of Connecticut like all other states must administer its courts within certain budgetary restraints. The State should not be made to subsidize the means through which the defendant in a civil litigation obtains possible evidence for his defense as a paternity defendant's liberty is not at stake.

Conn. Gen. Stat. 46b-168 does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. State laws are presumed to be valid under the equal protection clause as long as there is a rational basis for the legislative enactment.

The costs provision section of the blood grouping test statute does not deprive a defendant in a paternity action of a fundamental right nor create a suspect classification which would warrant the Court's strict scrutiny to find whether the law in question is buttressed by some compelling state interest. The right to obtain potential evidence in a civil litigation is not a fundamental right and indigency does not create a suspect classification.

Conn. Gen. Stat. Section 46b-168 is rationally based on the Connecticut legislature's desire to have civil litigants bear the costs of litigation which involves them and not to pass the costs on to those who have no interest in it.

Therefore, as Conn. Gen. Stat. Section 46b-168 does possess the necessary rational basis, it complies with the Equal Protection Clause of the United States Constitution.

ARGUMENT

I. THE DENIAL OF THE PAYMENT OF THE COSTS OF BLOOD GROUPING TESTS REQUESTED BY AN INDIGENT DEFENDANT IN A PATERNITY CASE DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

A. The petitioner has been afforded a meaningful opportunity to be heard.

The Petitioner has called into question the constitutionality of Conn. Gen. Stat. Section 46b-168 (1979).[1] Specifically, he claims that the provision of the statute which reads:

> "The costs of making such tests shall be chargeable against the party making the motion."

violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

The Petitioner continually errs by attempting to cloak paternity actions in the State of Connecticut with the same safeguards afforded criminal proceedings.

The Connecticut Supreme Court, in the case of *Robertson v. Apuzzo*, 170 Conn. 367 (1976) dispelled any notion that paternity actions in Connecticut may be considered criminal or quasi-criminal proceedings by holding that paternity actions are clearly civil in all aspects. In *Robertson*, the Connecticut Supreme Court held that an indigent defendant in a paternity action is not denied

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[1]The original denial of Walter Little's request that the State pay the costs of the requested blood tests was made pursuant to Conn. Gen. Stat. Section 52-184 which was transferred to Conn. Gen. Stat. Section 46b-168 by the 1979 revision of the Connecticut General Statutes.

constitutional due process when he was denied a jury trial because of his inability to pay the statutory fee.

This Court has stated that in determining whether in any particular case due process protection should be afforded one must begin with a determination of the precise nature of the governmantal function involved as well as the private interest that has been affected by governmental action. *Stanley v. Illinois*, 405 U.S. 645, 651, *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895. The governmental function involved in the present case is the maintenance of an orderly regulation of its court system by means of requiring that certain costs be borne by the litigants themselves.

The petitioner depicts a situation in which his right to a meaningful hearing has been extinguished by the statutory provision requiring him to pay the costs of a blood grouping test. The extent to which due process will be afforded is affected by the extent to which the claimant has gained or lost some fundamental interest. *Goldberg v. Kelly*, 397 U.S. 254, 263, *Ortwein v. Schwab*, 410 U.S. 656, 659, *U.S. v. Kras*, 409 U.S. 434.

This Court in *Boddie v. Connecticut*, 401 U.S. 371, set forth the requirements of due process which are mandated by the Fourteenth Amendment to the United States Constitution in stating:

> What the Constitution does require is an opportunity . . . granted at a meaningful time and in a meaningful manner, "*Armstrong v. Mango*, 380 U.S. 545, 552, 14 L.Ed. 2d 62, 85 S. Ct. 1187 (1965) (emphasis added), for [a] hearing appropriate to the nature of the case." *Mallane v. Central Hanover Tr. Co.*, supra, at 313, 94 L.Ed. at 873. The formality and procedural requisition for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceeding. 28 L.Ed. 2d at 118.

The petitioner argues that his inability to present evidence of blood grouping tests in his defense due to his lack of funds to procure them deprives him of a meaningful opportunity to be heard. This Court, in *Boddie*, however, refused to mandate any particular form of hearing, stating that the "formality and procedural requisites can vary depending upon the importance of the interests involved and the nature of the subsequent proceeding." *Boddie v. Connecticut*, supra.

This Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, enumerated three considerations which must be analyzed in identifying the due process requirements applicable to a particular situation. The Court stated:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail.

Taking these criteria and applying them to the instant case yields the following three relevant factors. First, the interest of the petitioner in defending the paternity action; second, the risk that without a waiver of blood grouping tests the petitioner will be deprived of his ability to defend the action and the probable value to his defense if such a waiver is allowed; and third, the State's interest in obtaining judicial determinations of paternity and the burden that the waiver of the costs of blood tests would put on the State's fiscal resources.

Obviously, a defendant does possess a strong interest in providing the best defense he can in any civil action.

The petitioner here, however, portrays a situation in which without the availability of blood grouping tests he is deprived of an opportunity to make a meaningful defense. This is not an accurate portrayal of the situation. The petitioner is represented by counsel. He has the ability to call witnesses on his behalf. He has the ability to cross examine his accuser. Finally, he has the ability to use pretrial discovery techniques such as interrogatories with which to prepare his defense.

The petitioner maintains that due to the increased reliability of the blood grouping tests to exclude putative fathers unjustly charged, his opportunity for a meaningful hearing is precluded without the tests. The fact is that the results of blood grouping tests are not always conclusive of the issue before the Court in a paternity case. The mere taking of the tests without cost to the petitioner is no more reliable than any other evidence which he might produce. Because the tests cannot be extended to produce a conclusive result in all cases, the failure of the State of Connecticut to pay the costs of blood grouping tests do not place these tests in such a category that without them the petitioner has been denied a meaningful opportunity to be heard and due process protections are lacking.

The taking of the blood grouping tests may result in no benefit to a defendant in defending a paternity action if the results are inconclusive or inclusive. The ability to have blood tests is therefore only a means of procuring evidence which may or may not be beneficial to the defense of a paternity action. What the petitioner is seeking is to have the State of Connecticut subsidize his defense. The due process requirements as outlined in *Boddie v. Connecticut*, 401 U.S. 371, do not require that the defendant be given free access to the means of potential evidence.

This Court in *Boddie* pointed out that a "State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the premise of the Due Process

Clause, "but within limits of practicability."

Blood grouping tests are not the only means by which a putative father may provide a defense in a paternity case. The petitioner's inability to pay for blood grouping tests does not prevent him from producing evidence of other factors which may be relevant in defending a paternity claim. Should a blood grouping test prove inclusive the plaintiff may be able to produce evidence which is more probative than an inconclusive test. In *Boddie*, the State held exclusive control of the methods of proof in divorce actions. In a paternity action, this type of exclusivity is not confined to the State. The denial of payment for a blood grouping test may deny the petitioner access to a source of potential evidence but it does not leave him without any recourse in putting forth a defense.

In Connecticut, paternity actions are maintained for the benefit of the mother and child to protect the State from the burden of the child's support. *Pelak v. Korpa*, 20 Conn. Supp. 346, 349 (1957). To impose upon that function the burden that the State must also subsidize an accused father's defense would unduly burden the State's fiscal resources.

Due to his indigency the petitioner may have been denied access to a tool to use in establishing evidence of his defense. This does not serve to deny him access to the judicial process as was done in *Boddie*. The petitioner can cite no constitutional guarantee which provides for access to the means of possibly producing his most effective defense in this civil action. The petitioner has not been denied a meaningful opportunity to be heard just because he cannot afford to present every possible type of evidence in his defense.

The State of Connecticut is not an entity with unlimited monetary reserves. The fiscal effects of requiring the State of Connecticut to bear the costs of blood grouping tests when a defendant in a paternity litigation is unable to, would have a substantial effect on the State's

general revenue fund. The State of Connecticut should not be required to provide a civil litigant with a defense. In the case of *Mathews v. Eldridge*, 424 U.S. 319, this Court was confronted with the problem of whether or not an evidentiary hearing must be held in all cases before Social Security Disability benefits are terminated. In discussing the fiscal impact of such a requirement, this Court stated at 348:

> "At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the costs. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited."

Although the factual circumstances of *Mathews* differs from the instant case, the Court's philosophy is quite relevant. Should the State of Connecticut, which must attempt to live within certain budgetary restraints, be required to bear the burden of financing the costs of blood grouping tests, which may or may not be of any probative value in the defense of a paternity action, then its ability to provide for needs of those who depend upon it for their sustenance will be lessened.

The legislature of the State of Connecticut has provided that the party requesting a blood grouping test must bear the costs. If the Connecticut legislature felt it could afford to provide the means for such a test to indigents, it would have done so. The legislature of Connecticut acted wisely in refusing to place the costs of blood grouping tests on its shoulders. If the State of Connecticut were to assume the costs of blood grouping tests, would not it have to bear the costs of any other evidentiary tool an

indigent might desire to use in his defense in a paternity action? For example, consider a situation in which an indigent defendant in a paternity action seeks to base his defense upon the results of blood grouping tests. The tests are given at the State's expense, however, the results are inconclusive. The defendant now shifts his defense to the claim that his accuser had sexual relations with another man near the time of conception of the child whose paternity is in question. If the defendant wished to take the other man's deposition, should the State be made to bear the cost? If the other man lived outside of Connecticut, should the State be made to pay the expense of bringing that man before the court for examination? Should the State be made to provide the defendant in a paternity action with expert witnesses? In sum, the State should not be made to bear the costs of providing a defense for any civil litigant. To begin assuming the costs of blood grouping tests would open the door to placing the State in the position of bearing the costs of all types of defenses in all types of civil litigation involving indigent defendants. Certainly this would place enormous pressure on State budgets which are already straining to remain in the black.

The equivalence of the opportunity for indigents to make a defense cannot be done at the State's expense. The opportunity to be meaningfully heard must be tempered by the caveat that such opportunity must be within limits of practicability. *Mallane v. Central Hanover Tr. Co.*, 339 U.S. 306, 317-319 (1950); *Covey v. Town of Somers*, 351 U.S. 141 (1956).

The State of Connecticut has met the mandate of the Due Process Clause by providing to a defendant in a paternity action a meaningful opportunity to be heard. That opportunity is presented to the petitioner through the rules applicable to civil actions. A defendant in a paternity action has available to him the rules of pre-trial discovery and a full trial on the issue of paternity in which he may present all evidence relevant and material to his defense.

The Due Process Clause does not require the State to assist indigent defendants in their defense in any civil action.

This Court in *United States v. Kras*, 409 U.S. 434, (1973), specifically pointed out that Boddie "obviously stopped short of an unlimited rule that an indigent at all times and in all cases has the right to relief without payment of fees."

B. A Connecticut paternity proceeding is a civil action.

The plaintiff takes great pains in attempting to interject criminal or quasi-criminal overtones into paternity actions in the State of Connecticut. The nature of a paternity action was dealt with in great detail in the case of *Robertson v. Apuzzo*, 170 conn. 367, cert. denied, 429 U.S. 852 (1976). That case involved the question of whether an indigent defendant in a Connecticut paternity action is entitled to a jury trial without the payment of the statutory fee required of every party to a civil action who desired a trial by jury rather than by a court. The Connecticut Supreme Court answered in the negative.

After making a comprehensive examination of the one hundred and fifty year history of paternity actions in the State of Connecticut, the Connecticut Supreme Court concluded that paternity actions are unequivocally civil in nature. The Court examined every element constituting a paternity action in the State of Connecticut and found the sole purpose of a paternity action to be 'the maintenance of the bastard in aid of the mother.' The critical analysis made by the Connecticut Supreme Court takes paternity actions out of the realm of those cases which civil versus criminal has been determined through a "wooden approach" as discussed in *McKiever v. Pennsylvania*, 403 U.S. 528, 541 (1971). With respect to paternity actions in Connecticut, the term "civil" is more than just a label.

The petitioner, nevertheless, attempts to raise Due Process safeguards accorded indigents in criminal proceedings to cover himself as an indigent defendant in a civil paternity action. Instead of looking at the nature of the action itself, he fashions his claims out of the consequences of non-compliance with the court's orders. The petitioner attempts to build the theme that when an adjudicated father fails to carry out the court's orders, the imprisonment, inter alia, which may be brought about by contempt is punishment imposed by the legislature, which punishment if it does not constitute criminal punishment, at least parallels criminal punishment. This theme, however, ignores the purpose of contempt proceedings under Conn. Gen. Stat. Section 46b-171 (1979).[2]

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[2]Sec. 46b-171. (Formerly Sec. 52-442). Judgment and order of Court. If the defendant is found guilty, the court shall order him to stand charged with the support and maintenance of such child, with the assistance of the mother if she is financially able, and to pay a certain sum weekly until the child attains the age of eighteen years; and the court shall ascertain the expense of lying-in and of support and maintenance of the child until the time of rendering judgment, and order him to pay the amount thereof to the complainant, or, if a town or the state has paid such expense, to the town or the state, as the case may be, and shall grant execution for the same and costs of suit taxed as in other civil actions, together with a reasonable attorney's fee; and may require him to become bound with sufficient surety to perform such orders for support and maintenance and the expense of lying-in and to indemnify the state or the town chargeable with the support of such child from any expense for its maintenance. If he fails to comply with any such order, the court may commit him to a community correctional center, there to remain until he complies therewith; but, if it appears that the mother does not apply the weekly allowance paid by him toward the support of such child, and that such child is chargeable, or likely to become chargeable, to the town where it belongs, the court, on application, may discontinue such allowance to the mother, and may direct it to be paid to the selectmen of such town, for such support, and may issue execution in their favor for the same. The provisions of section 17-323a shall apply to this section. The clerk of the court which has rendered judgment for the payment of money for the maintenance of any child under the provisions of this

To understand the purpose of contempt under Conn. Gen. Stat. Section 46b-171 the question must be asked, ". . . what does the court primarily seek to accomplish by imposing sentence?" *Shillitani v. U.S.*, 384 U.S. 364, 370 (1965).[3] Insofar as Section 46b-171 is concerned, the purpose of imposing sentence by way of contempt is to coerce the contemnor to carry out what he refused to do, 'the maintenance of the bastard in aid of the mother.' The contempt proceedings under Section 46b-171 are designed to operate in a prospective manner. They are entirely consistent with the purpose of the paternity action and, from any realistic point of view, such contempt proceedings are remedial in purpose.

Although all contempts ". . . are neither wholly civil nor altogether criminal . . ." *Grompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1910), and "[w]hile any imprisonment, of course, has punitive and deterent effects . . . ." *Shillitani v. U.S.*, supra, where there is the imprisonment of a contemnor which is intended to be remedial by the means of coercion, rather than intended to inflict punishment, the remedy is said to one for civil contempt. *Penfield Co. v. S.E.C.*, 330 U.S. 585, 590

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section shall, within twenty-four hours after such judgment has been rendered, notify the selectmen of the town where the child belongs. Any order for the payment of support for any such child may at any time thereafter be set aside or altered by any court issuing such order. Failure of the defendant to obey any order for support made hereunder may be punished as for contempt of court and the costs of commitment of any person imprisoned therefor shall be paid by the state as in criminal cases.

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[3]The appellant cites Conn. Gen. Stat. Section 53-304(a) as giving the court the power to imprison for the failure to comply with the court's monetary orders for support. In fact, almost all contempts for the non payment of support orders arising from paternity adjudications are brought pursuant to Conn. Gen. Stat. Section 46b-171 (1979).

(1946). The petitioner has never been able to point to any part of the instant case which would show that any punishment by reason of the contempt is intended as a deterrent to offenses against the public and does not serve only the purposes of the complainant. Id.

While the 'impact' or 'effect' of punishment upon a person is always an important consideration in any case, in the present case, they can rise no higher in importance than the obligation of an adjudicated father's obligation to support his child. Even though the impact or effect of punishment is ever present under Section 46b-171, ending the contempt at any time, and even preventing the contempt in the first place is always within the exclusive control of the contemnor. It is he alone that determines the degree of impact or effect of punishment on himself and not the State.

In the last analysis, plaintiff's argument has as its basis the uncoupling of the function of the contempt proceedings from the purpose of the paternity action. To view possible contempt proceedings as if the purpose of the paternity action never existed would be meaningless and fails to advance the cause of law. To accept, the petitioner's argument that the provisions of Connecticut law for accomplishing execution of the court's money judgment and for contempt proceedings for failure to comply with the orders of the court converts the petitioner's cause of action from a civil to a criminal one is tantamount to saying that the provisions of 46b-171 exist but without a role to play in the paternity laws of Connecticut.

Finally, it must also be noted that any prospective possibility of the loss of one freedom caused by the failure to comply with monetary orders entered in a paternity case would have to arise only from a wilful refusal to pay

and never from an inability to do so because of indigency.[4] A defendant in a contempt proceeding has a right to counsel and is afforded a meaningful opportunity to be heard. He has every opportunity within the rules of practice to make his defense and show why he should not be held in contempt.

C. The laws of other state jurisdictions are irrelevant with respect to the Connecticut blood grouping test statute.

The plaintiff attempts to depict the state of the law in Connecticut with regard to blood grouping tests as an aberration in this field.

An examination of the statutory and case law throughout the jurisdictions of this country reveals a different picture. There are nineteen states and the District of Columbia which provide by statute for the payment of blood grouping tests by various public entities, i.e., state, county, municipal. Most of these jurisdictions also view paternity actions as criminal proceedings. In Connecticut, such is not the case, *Robinson v. Apuzzo*, 170 Conn. 367, 372 (1976). The remaining thirty-one states make no specific provision for providing an indigent defendant with a blood grouping test at no cost to him. Some states do all allow a trial judge a degree of discretion in determining who will pay for the tests. Other states make no mention of who is to bear the costs of the tests.

The fact that blood grouping tests may be available to indigents in paternity actions in many states does not make it a constitutional mandate that the State of Connecticut also must bear the same expense. This Court has

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[4]In the present action, Walter Little was ordered to pay $1.00 per month as current support and $1.00 per month toward an arrearage amount of $6,974.48 (J.A. 20).

noted that sovereignty of the states in the case of *Madden v. Kentucky*, 309 U.S. 83, 93 when it stated:

> "In the states, there reposes the sovereignty to manage their affairs except only as the requirements of the Constitution otherwise provide."

The State of Connecticut provides an indigent defendant in a paternity case with the opportunity to have legal counsel, to perform pretrial discovery, cross examine witnesses and to avail himself of the appellate process. The requisites for a meaningful opportunity to be heard for an indigent defendant in a paternity case is met by the paternity legislation of Connecticut.

The petitioner also attempts to extend heretofore unknown due process protections for civil litigants to himself by labeling himself an involuntary litigant and on one occasion, just because he is a defendant. Speaking practically, the majority of all defendants in civil actions are involuntary litigants. No one would suggest, however, that all involuntary litigants in civil actions may have a state pay for their defense. Certainly such a situation would involve costs of a fantastic nature.

The petitioner claims the factors of involuntariness potential criminal sanctions, state action, and his incarceration should invoke Due Process protection by compelling the State to pay the costs of his blood grouping tests. All of the cases cited by the plaintiff in support of this position are criminal in nature or are connected with the criminal justice system. The plaintiff may have been incarcerated at the time during which the issue of paternity was being litigated, but this fact should not extend additional due process protections to this civil litigation. The cases cited by the petitioner all involve situations in which someone's freedom was at issue in some manner. As noted above, the freedom of a defendant in a paternity action in Connecticut is no way at issue, therefore, negating the due process benefits the petitioner

seeks in this civil litigation.

The plaintiff also contends that the State should bear the costs of blood grouping tests because of the special status he awards this type of litigation. He wishes to avoid a swearing contest in which a desperate judge attempts to find the truth. A paternity case should not be awarded a special status. The trial of paternity does not differ from any other civil litigation in that the judge hears the witnesses and within his discretion gives whatever weight he deems warranted to the testimony of those involved. The search for the truth in a paternity action is not of such a nature that a state is constitutionally required to pay for an indigent's defense.

ARGUMENT

II. THE DENIAL OF THE PAYMENT OF COSTS OF BLOOD GROUPING TESTS REQUESTED BY AN INDIGENT DEFENDANT IN A PATERNITY CASE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. The Connecticut blood grouping tests statute has a rational basis.

State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause. *Lockport v. Citizens for Community Actions*, 430 U.S. 259, 272. State legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative classifications are valid unless they bear no rational relationship to a permissible state objective. *New York City Transit Authority v. Beager*, 440 U.S. 568, *Vance v. Bradley*, 440 U.S. 93, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314; *Dandridge v. Williams*, 397 U.S. 471, 485.

Not all legislation, however, is entitled to the same presumption of validity. The presumption is not present when a state has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications in a constitutional sense are inherently "suspect." *McLaughlin v. Florida*, 397 U.S. 184, *Brown v. Board of Education*, 347 U.S. 483. And the presumption of statutory validity may also be undermined when a state has enacted legislation creating classes based upon certain other immutable human attributes, See e.g. *Oyama v. California*, 332 U.S. 633 (national origin), *Graham v. Richardson*, 403 U.S. 365 (alienage), *Gomez v. Perez*, 409 U.S. 535 (illegitimacy), *Reed v. Reed*, 404 U.S. 71 (gender). The plaintiff's indigency is not one of those

attributes which mandate equal protection scrutiny.

In the absence of invidious discrimination, however, a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a state as expressed in the laws passed by their popularly elected legislatures. "The Constitution presumes that absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. *Vance v. Bradley*, 440 U.S. at 97. This is not meant to infer that the provision of Conn. Gen. Stat. 46b-168 (1979) now being attacked is anything but sage legislation, however, it is mentioned to show that the petitioner and those similarly situated have the ability to make their requests known to the state legislature and seek new legislation to provide for their need.

This Court stated in the case of *Parham v. Hughes*, 441 U.S. 349, 352 (1978):

> If the statute is not invidiously discriminatory, it is entitled to a presumption of validity and will be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislatures actions were irrational."

Certainly, the intention of a legislature to have its civil litigants bear the costs of their own defense is not an irrational one but rather one imbued with economic responsibility.

In determining whether a statute violates the Equal Protection Clause of the United States Constitution, this court has normally invoked a strict scrutiny test or a rational basis test depending upon the type of rights involved.

The strict scrutiny test is applied when a party is denied equal protection of a law in the form of the denial of

a fundamental right. Fundamental rights deserving strict scrutiny are of the nature of the right to vote, *Dunn v. Blumstein*, 405 U.S. 330, the right of an indigent to medical care, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, the right to interstate travel, *Shapiro v. Thompson*, 394 U.S. 618, freedom of association, *Kusper v. Pontikes*, 414 U.S. 51. Strict scrutiny may also be applied if the legislation in question creates a suspect classification based on race, *Loving v. Virginia*, 388 U.S. 1, or upon alienage or national origin, *Graham v. Richardson*, 403 U.S. 365.

The right of an indigent defendant in a paternity action to have the costs of blood grouping tests which may be used in his defense provided by the State is not one of those fundamental rights which warrants strict scrutinization by this Court. The Connecticut Supreme Court in the case of *Robertson v. Apuzzo*, 170 Conn. 367, has said that paternity legislation designed to provide for the support and maintenance of the child is in the area of economics and social welfare.

Indigency in civil litigation is not one of those suspect classifications demanding the strict scrutiny of this Court. This court has held that wealth discrimination alone is not sufficient for invoking strict scrutiny. *San Antonio Independent School District, et al v. Demetris P. Rodriquez, et al*, 411 U.S. 1, 29.

The strict scrutiny test should not be applied because the ability to have blood grouping tests performed is not a fundamental right. This is true, since as discussed earlier, due process does not require that a defendant in a paternity action be given free access to the means of discovering potentially probative evidence. The State should not be made to justify the legislation in question by showing some compelling state interest as the basis of the legislative enactment.

The petitioner's rights to a blood grouping test is of no greater constitutional significance than the right to a dis-

charge in bankruptcy. This Court addressed the question of the fundamentality of such rights in *U.S. v. Kras*, 409 U.S. 434, 446, by stating:

> "[t]he right to a discharge in bankruptcy is not a fundemental right demanding a compelling governmental interest as a precondition to regulation and there is a rational basis for the fee requirement."

In the case of *Ortwein v. Schwab*, 410 U.S. 656, 660, the Court dealt with equal protection claims in this manner:

> ". . . Nor is the filing fee requirement violative of equal protection, since the applicable standard in the area of social and economic regulation when a suspect classification is not present is rational justification and here the requirement of rationality is met."

The proper standard of review is by means of the rational basis test. As stated above in *Robertson v. Apuzzo*, 170 Conn. 367, Connecticut Supreme Court has termed paternity legislation to fall in the area of economic and social welfare legislation. This Court spoke to this field of legislation in the case of *Dandridge v. Williams*, 397 U.S. 471, 486 when it stated:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis it does not offend the Constitution simply because the classification is not made with the mathematical nicety or in practice results in some inequality. *Lindsly v. National Carbonic Gas Co.*, 220 U.S. 61, 78.

A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 426. Justification of Conn. Gen. Stat. Section 46b-168 may be made without

much difficulty. Conn. Gen. Stat. Section 46b-168 provides that the costs of taking blood grouping tests shall be chargeable against the party making the motion. The purpose of this provision is clear. Since the Court may order the taking of blood grouping tests the specific requirement regarding their payment was to insure that the judiciary, and in turn the State, would not be held liable for the costs of such tests when performed pursuant to a court order. The legislation is designed to insure that litigants bear the costs entailed in the preparation of their cause of action, or their defense. The statute is therefore supported by a clear rational basis.

The fact that an indigent defendant in a paternity action may not obtain a blood grouping test is nothing more than a form of economic inequality which is often encountered by most people in their daily lives. The legislature of Connecticut is aware of such inequities and it is there where the petitioner's problem should be considered. To have this Court settle the petitioner's problem is to mute the legislative process without attempting to achieve a more practical solution for all concerned.

CONCLUSION

Conn. Gen. Stat. Section 46b-168 (1979) does not violate the Due Process nor the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The judgment of the Appellate Session of the Superior Court of Connecticut should, therefore, be affirmed.

Respectfully submitted,

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